No. 15041

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MA CHUCK MOON and MA CHUCK WOON,
Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States; HERBERT BROWNELL, JR. Attorney General of the United States, and JOHN P. BOYD, District Director of Immigration and Naturalization,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING OR HEARING *EN BANC*

WILL G. BEARDSLEE
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The decision in this case is apparently bottomed on the original and *not the amended complaint,* by which John P. Boyd, District Director of Immigration and Naturalization was brought into the case.

The respondent Boyd issued warrants of arrest for each of the appellants seeking their deportation as *aliens* for having committed perjury in the former case.

The amended complaint joining the District Director of Immigration and Naturalization as a party defendant alleges that plaintiffs have been *denied by said Director* rights and privileges as American Nationals (R. 29) in that he has issued warrants of arrest for deportation, charging plaintiffs as follows:

> "Whereas, from evidence submitted to me, it appears that the alien (Ma Chuck Moon), Ma Chuck Woon, who entered this country at Seattle, Washington, on the 9th day of September, 1952, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to-wit: Section 241(a)(4) of the Immigration and Nationality Act, in that he has been convicted of a crime involving moral turpitude committed within five years after entry and sentenced to confinement therefore in a prison or corrective institution for a year or more, to-wit, Perjury." (R. 18)

Plaintiffs on July 29, 1955, moved for summary judgment. (R. 13) Defendants moved for summary judgment September 21, 1955, *under the amended complaint* (R. 30), and it was error for the Court to deny appellants' motion.

To deny plaintiffs their day in court is to deny them rights vouchsafed them under the Fifth Amendment to the Constitution of the United States.

> The denying of a judicial remedy to a citizen in a controversy affecting his citizenship, otherwise judiciable, would be in violation of the Fifth Amendment to the Constitution.

Tijerina v. *Brownell*, 141 F. Supp. 266 (Tex.), citing *Acheson* v. *Yeeking Gee* (9 Cir.) 184 F. 2d. 134, and *Acheson* v. *Mariko Kuniyuki* (9 Cir). 189 F. 2d 741.

STARE DECISIS

In the opinion filed in the instant case on October 1, 1956, written by Judge Orr and concurred in by Judges Pope and Fee, the writer of the opinion without making any reference whatsoever to the Furusho case said (p. 3 slip sheet):

> "We find no merit in the contention of appellants that since there is a difference in the parties named in No. 2749 and No. 3870, res judicata does not apply. The first action was brought by Ma Tarn Sun on behalf of Moon and Woon; however they were in fact plaintiffs there as they are here. In No. 2749 the action was against the Secretary of State, and in No. 3870 the Attorney General of the United States was defendant. This difference is not sufficently material as to prevent the application of res judicata. No. 2749 and No. 3870 are in effect suits against the United States."

The opinion goes on to quote from the case of *Sunshine Coal Co.* v. *Adkins*, (1940) 310 U.S. 381, 402, 60 S.Ct. 907, 84 L.Ed. 1263, in which it was held there is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government.

That case, we assert, neither raised nor discussed any denial of a constitutional right and is the highest authority for the questions there raised which are entirely foreign to the constitutional question raised by appellants against the District Director of Immigration and Naturalization and the Attorney General of the United States *who seek to deport appellants as aliens* while appellants claim and have by affidavit of their father established without any denial on the part of any of the appellees and particularly the Director of Immigration and Naturalization and the Attorney General that they are in fact American Nationals and entitled under the Constitution to have their day in court on that defense to the deportation proceedings instituted against them.

In *Espino* v. *Wixon* (9 Cir.) 136 F. 2d 96.

Judge Orr, who wrote the opinion in the instant case and who with Judge Pope sat on the *en banc* case

of *Acheson* v. *Furusho*, 212 F. 2d 284, the personnel of which sat thereon consisted of Chief Judge Denman and Judges Stevens, Healy, Bone, Orr and Pope, in refuting the claim of the United States Attorney that the Furusho and other cases under consideration were in fact suits against the government said: (p. 290)

> "*In the first place the government may not be sued without its consent and it has been and still is a governmental policy to grant consent sparingly.* To enact a law making every suit against the head of a governmental department virtually against the department over which he presides, would be widening the consent greatly.
>
> "Besides, it might well result in the direction of a successor to an ex-official to do what he believed to be contrary to his duties without the opportunity to defend his contentions. Other difficulties are easily conjured."

After much research we have been unsuccessful in finding any adjudicated citizenship case in which the doctrine of res judicata has ever been applied but, as stated at page 26 of our opening brief, in the case of *Tom We Shung* v. *Brownell*, 227 F. 2d 40, 41, we find this expression:

> "The present question whether review may be had on a complaint filed after the 1952 Act took effect, is not res judicata, since it neither was or could have been decided in the previous suit filed before the Act took effect."

At the time the former suit was tried in 1954 the question here presented — denial of a right by the Di-

rector of Immigration and Naturalization — was not involved "*since it neither was or could have been decided in the previous suit filed before the Act took effect*", because it was not until the 12th of May, 1955, more than a year after the judgment of dismissal of the first case that the appellee Director of Immigration and Naturalization issued and served his warrants of arrest for deportation of appellants as aliens, that that question arose.

These questions were elaborately argued and thoroughly presented in our opening brief.

The affirmance of the district court's judgment in this case on the doctrine of res judicata is tantamount to a denial of rights vouchsafed to appellants in their defense of the deportation proceedings under the Fifth Amendment to the Constitution of the United States and it is earnestly requested that the question be re-examined to the end that appellants may not be foreclosed from proving in any future administrative proceeding seeking their deportation their true national status.

It is therefore respectfully requested that a rehearing be granted.

Respectfully submitted,

WILL G. BEARDSLEE
Attorney for Appellants

CERTIFICATE

I, Will G. Beardslee, hereby certify that in my professional judgment the petition for re-hearing herein is well founded and it is not interposed for delay.

Will G. Beardslee

Attorney for Appellants.